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**FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION**

JAN 17 2019

STEPHANIE CAMERON, CLERK
BY: Stephanie Cameron

6 || Attorneys For Real Party In Interest

TULARE COUNTY SUPERIOR COURTS
STATE OF CALIFORNIA, VISALIA DIVISION

In Re SEARCH WARRANT #013487

CASE NO:

YORAI BENZEEVI,

PEOPLE'S REPLY TO DR.
BENZEEVI'S RESPONSE TO
PEOPLE'S BRIEF REGARDING
JANUARY 22, 2019 EVIDENTIARY
HEARING

Moving Party,

v.

SUPERIOR COURT OF THE COUNTY OF
TULARE.

Respondent.

TULARE COUNTY DISTRICT ATTORNEY,

Date: January 22, 2019

Time: 8:30

Dept: 13

Respondent, the People of the State of California, by and through their attorneys, TIM WARD, District Attorney, and TREVOR HOLLY, Deputy District Attorney, submit this REPLY TO DR. BENZEEVI'S RESPONSE TO PEOPLE'S BRIEF REGARDING JANUARY 22, 2019 EVIDENTIARY HEARING related to search warrant #013487. This reply is based upon the pleadings, points and authorities, evidence, and argument presented at the hearing of the matter.

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3 **STATEMENT OF THE CASE**

4 In the Movant's "Surreply To Motion to Return Property" the defensc
5 purported to make a motion under *Franks v. Delaware* seeking to quash search warrant
6 #013487. (Movant's Surreply To Motion to Return Property, at 6.) At the hearing conducted
7 on November 9, 2018 the court declined to rule on the implied *Franks* motion. The Court
8 noted that *Franks* motions are subject to detailed procedures under criminal law, but as no
9 charges have been filed in this case it is somewhat unclear how to proceed (Ex. 1, Certified
10 Reporter's Transcript NO. VSW 013487 11/09/18 ("RT" herein), at 37, ln 1-5). The Court
11 invited both parties to submit points and authorities in the matter (Ex. 1, RT at 37 lincs 17-
12 18). It is notable that at no point in the proceedings has the Court authorized a hearing under
13 *Franks v. Delaware*. The only currently scheduled hearing is a motion to determine
14 ownership of stolen funds seized from Dr. Benzeevi's account.

15 **ARGUMENT AND AUTHORITY**

16 **INTRODUCTION**

17 Movant has submitted a reply entitled "Dr. Benzeevi's Response to People's
18 Brief Regarding January 22, 2019 Evidentiary Hearing." This title encompasses the flaw
19 throughout the movant's pleadings, the consistent attempt to confuse the law of *Franks v.*
20 *Delaware*, and motions brought to quash warrants with the evidentiary hearing required for
21 stolen property under *People v. Superior Court (McGraw)*(1979) 100 Cal. App. 3d 154. First,
22 the movant acts as if the Court has granted them a *Franks* hearing, which it has not. Second,
23 they also act as if the two hearings were similar, which they are not. Once again they are
24 unable to illustrate that they meet their burden of making a substantial preliminary showing
25 that the affiant deliberately and recklessly omitted material facts of such import that they
26 change the probable cause determination. (*People v. Eubanks* (2011) 53 Cal. 4th 110, 136). In
27 fact, they fail to address any of the arguments made in the People's motion.

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I. MOVANT HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO TRIGGER
A *FRANKS* HEARING.

In the previous motion, the People detailed how the movant failed to establish any facts sufficient to trigger a *Franks* hearing. It is notable that in response the defense failed to address any of those issues, but rather complained of the People's accompanying exhibits. The exhibits were submitted because, ironically, the movant had made untrue statements and omitted relevant information.

Movant's response revolves around a contention that the TAM account is the so called "master account" under the MSA. As the People have noted, the defense has presented **no evidence** that this is true and, in fact, the TAM account is not the master account. To find for the movant the Court would have to, at minimum, determine that Investigator Klassen read the MSA, analyzed its contractual terms in the same manner as the movant, concluded the TAM account was the master account, and then purposely omitted the information.

Assuming only for argument's sake that the Court could reach that point, the Court would still have to determine that such analysis would alter the probable cause determination. Celtic finance believed their money was going to the hospital, not to Dr. Benzeevi. Nothing the movant has submitted would have altered that material misrepresentation to Celtic, and therefore the probable cause determination would stand even if their allegations were true.

II. *FRANKS HEARINGS AND HEARINGS CONDUCTED UNDER McGRAW*
ARE SUBSTANTIALLY DIFFERENT.

Only after the defense meets its preliminary burden may a hearing be held. The second stage of a *Franks* motion is an evidentiary hearing in which the defense may present witnesses and evidence to try and establish the falsity of the information included in the affidavit. Usually the defense will subpoena the affiant for cross-examination. The burden of proof is with the defendant. The defense burden is to show, by a preponderance of the evidence, that the affiant deliberately included false information or did so in reckless disregard of the truth. If this is found to be the case, the defendant must still show that without this information (or after including the omitted information), the magistrate did not have

1 probable cause to issue the warrant. The motion to suppress should be granted if the affidavit,
2 as redacted, does not provide probable cause. The fact the affiant included deliberate
3 falsehoods or information made in reckless disregard of the truth, by itself, is not sufficient to
4 support suppression. "The affiant's duty of disclosure extends only to material adverse facts,
5 which, if omitted, would distort the probable cause analysis." (*People v. Berkoff*, 174 Cal.
6 App. 3d 305, 310, 219 Cal. Rptr. 878 (2d Dist. 1985).)

7 Here, as the burden would be on the movant, at a hearing the movant would
8 put their witnesses on first. They would then have the burden of establishing every element of
9 their case prior to the People putting on any evidence (*Theodor v. Superior Court* (1972) 8
10 Cal.3d 77, 101). This is the exact opposite of a hearing under *McGraw*, which requires the
11 burden of proof to be on the People (*People v. Superior Court (McGraw)* (1979) 100 Cal.
12 App. 3d 154). The issues are different as well. The only issue at the scheduled hearing to
13 return property is whether the property is stolen or not; the warrant is irrelevant. At a *Franks*
14 hearing, the issue is the warrant itself. If the Court permits a *Franks* hearing to proceed
concurrently, it will be faced with conflicting standards of law, evidence, and procedure.

15 Perhaps the strangest part of movant's insistence on a *Franks* hearing is that
16 even if it could succeed, it would not result in the return of the funds to Dr. Benzeevi.
17 Statutory law and case law clearly establish that stolen or embezzled property should be
18 seized and returned to its rightful owner (PC § 1407, PC § 1408, and PC § 1409). "Stolen
19 property in the hand of a thief is contraband" (*People v. Superior Court (McGraw)* (1979) 100
20 Cal. App. 3d 154, 157, 160). When a search warrant is quashed, the Court may not return
21 property that it is unlawful to possess (*Aday v. Superior Court of Alameda Cty.*, (1961) 55
Cal. 2d 789, 800).

22
23 III. ALL RELEVANT EVIDENCE MAY BE ADMITTED AT THE HEARING
24 REGARDING STOLEN FUNDS SEIZED FROM DR. BENZEEVI.

25 In their motion, and in an accompanying discovery letter, the movant has
26 stated that evidence beyond allegations contained in the warrant should not be admitted.
27 This is simply not the case. The hearing scheduled for January 22, 2019 is a hearing to
28 determine the title of property. At that hearing, all relevant evidence is admissible. *People v.*
Superior Court (McGraw) (1979) 100 Cal. App. 3d 154, 159). The People will be presenting

1 evidence and legal theories supported by the current investigation and will not be limited to
2 the state of evidence at the time of the warrant. This is because the determinative issue is
3 whether the property is indeed the product of illegal conduct. The issue is not, nor has it ever
4 been, the warrant.

5 **CONCLUSION**

6 The movant has failed to carry even its preliminary burden to obtain a *Franks*
7 hearing as they have failed to show that their alleged omissions were material, deliberate, or
8 would have altered the probable cause determination. Having failed in meeting their
9 preliminary burden, the Court should deny their *Franks* motion. The only hearing on January
10 22, 2019 should be regarding the stolen funds in Dr. Benzecry's account. Even if the Court
11 found that the defense had somehow met their *Franks* burden, the Court should hold a
12 separate hearing so as to not confuse the issues as to a motion to traverse a warrant and a
13 motion to determine the title of seized property.

14 Dated: January 17, 2019

15 Respectfully submitted,

16 **TIM WARD**
17 **DISTRICT ATTORNEY**

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19 **TREVOR HOLLY**
20 **DEPUTY DISTRICT ATTORNEY**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF TULARE

The undersigned declares:

I am a citizen of the United States. My business address is 221 S. Mooney Blvd., Room 224, Visalia, California 93291. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused the **PEOPLE'S REPLY TO DR.**

BENZEEVI'S RESPONSE TO PEOPLE'S BRIEF REGARDING JANUARY 22, 2019

**EVIDENTIARY HEARING in the matter of YORAI BENZEEVI vs SUPERIOR COURT OF
THE COUNTY OF TULARE, to be served on:**

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Mail Interoffice Mail Overnight Mail Fax XX

Hand Delivered Certified Mail Pick-up In Court

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2019.

Jenna Dunlop
Jenna Dunlop
Supervising legal Office Assistant